No. 82-1616

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT, WEBER AIRCRAFT CORPORATION.

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I. STATEMENT OF THE CASE.

On October 9, 1973, Captain Richard Hoover (hereinafter "Hoover") ejected from a disabled fighter aircraft. As a result of injuries received upon his ground impact, he became a paraplegic.

He subsequently sued six defendants, alleging that his injuries were the result of defects in his parachute assembly. Included among those defendants is respondent Weber Aircraft Corporation,[1] which is alleged to have negligently designed a portion of the parachute assembly.

In deposition, Hoover testified, as he had during the Air Force legal investigation, that he had assumed the correct landing position and landed on his feet. He testified that he

[1]Respondent Weber Aircraft Corporation is a wholly-owned subsidiary of Walter Kidde & Company, Inc.

did nothing wrong, and that his injuries were due to an excessive descent rate.

At a subsequent deposition, Air Force employee John F. Findley testified and, pursuant to valid subpoena, produced, without objection, a number of documents which were examined by all parties present. Those documents contained a *verbatim* statement given by Hoover to the Air Force safety board, in which he testified that he had failed to execute the proper maneuver on landing and, contrary to his deposition testimony, had raised his knees in a crouch and landed, not on his feet, but on an undeployed seat kit. Also produced were documents setting forth the safety board's conclusion that Hoover's injuries were due to *Air Force personnel error* in reassembling the seat kit disconnect mechanism. These documents were subsequently seized from the court reported by the Air Force following a "reminder" to the Air Force that the documents contained portions of a "privileged" safety report.

In a previous deposition, Airman Sammy Dickson, the last parachute rigger to work on Hoover's parachute assembly prior to the accident, testified that he had done no work involving the disconnect mechanism.

Airman Dickson's supervisor subsequently testified that it was physically impossible to conduct the work that Airman Dickson was supposed to have done without having disassembled, and then reassembled, the disconnect mechanism. Following the accident, Dickson was permanently barred from ever again working on personnel parachutes.

Respondent subsequently requested Hoover's and Dickson's statements to the safety board pursuant to the Freedom of Information Act ("FOIA"), and the Air Force asserted an Exemption 5 privilege. Respondent brought suit to compel the production of these documents (J.A. at 8-12), and

the trial court entered summary judgment for the government (the trial court's Findings of Fact and Conclusions of Law are set forth at Pet. App. 21a), finding that the statements were privileged under *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963), and thus fell within the scope of Exemption 5.

Respondent appealed to the Ninth Circuit, which reversed, relying on *FOMC v. Merrill*, 443 U.S. 340 (1979), which held that Exemption 5 covered only those civil discovery privileges which the legislative history showed were contemplated by Congress, and finding that the legislative history showed no evidence that Exemption 5 was intended to include the *Machin* privilege. *Weber Aircraft Corp. v. U.S.*, 688 F.2d 638 (9th Cir. 1982). It is that ruling which the government petitions this Court to reverse.

II.
SUMMARY OF ARGUMENT.

When Congress enacted FOIA, it was attempting to remedy years of improper withholding of information by the government under such vague standards as "requiring secrecy in the public interest". It did so by enacting a broad mandate that all information be released unless it falls within nine exemptions, which were exclusive and to be narrowly construed.

In enacting Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", Congress sought primarily to protect the quality of the government's decision-making by shielding from disclosure all documents generated within an agency which contained the give-and-take of the decision-making process, *i.e.*, memoranda setting forth advice, opinions, analysis, or policy. The legislative history makes

it clear that Congress did not intend to protect documents which were received from outside the agency or which related purely to factual matters, such as the witness statements here at issue.

There was no intent to incorporate within Exemption 5 every privilege known to civil discovery, and especially no intent to include the *Machin* privilege for confidential statements given to military aircraft accident safety investigation boards, which was based on the very standard of interference with agency effectiveness which FOIA was intended to abolish.

On the contrary, the legislative history of Exemption 7 shows a clear rejection by the Congress of a request by the government, and particularly by the Defense Department, to amend Exemption 7 to include the *Machin* privilege. Despite a specific reference to *Machin* and to the witness statements here at issue as documents which should be protected, Congress refused to extend the scope of Exemption 7 to cover such materials, but instead enacted an exemption limited solely to "investigatory records compiled for law enforcement purposes". Had Congress intended to protect allegedly confidential non-law enforcement investigatory records, it could easily have said so in Exemption 7. The clear implication is that such records are not protected by the Act.

The legislative history of Exemption 3 reinforces this conclusion. Following this Court's decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which allowed the FAA to withhold information received under a promise of confidentiality when required in "the interest of the public", Congress immediately amended Exemption 3 to restrict such withholding to situations in which a statute either flatly prohibited release of the information, or contained particular criteria for withholding or reference to particular

types of material to be withheld. In other words, unless Congress gave specific direction to the agency as to how or what to withhold, the information must be released. This history is, again, completely contrary to the thrust of the government's argument here.

In addition to the legislative history of FOIA, other Congressional action shows the clear intent of Congress that information such as witness statements be disclosed. Congress has twice refused, in 1980 and 1983, to enact specific legislation that would bring these statements under Exemption 3, stating that the matter "requires further study". And, in the case of the FAA and NTSB, which perform the identical task of accident investigation for civilian aircraft accidents, Congress has specifically directed that such information be disclosed and has, in fact, amended the FAA's and NTSB's governing statutes to remove the discretion to withhold which they once contained.

The Congress has thus refused to enact legislation to shield the witness statements which are here at issue, and has directed their disclosure in the parallel civilian investigations. There is no essential difference between either the civilian accidents or witnesses and those in the military that would lead to any inference that Congress wishes to treat them any differently.

Moreover, even if such statements were subject to Exemption 5, the government has failed to meet its burden of proof that the statements were in fact given pursuant to a promise of confidentiality, or that any safety issue is in fact presented by their release.

Finally, the equities of this case mandate the disclosure of these statements in any event, due to the waiver of the privilege by the government and the overriding interest of the judicial system in preventing perjury.

III.
ARGUMENT.

A. EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT DOES NOT INCORPORATE A DISCOVERY PRIVILEGE FOR STATEMENTS MADE BY WITNESSES IN MILITARY AIR CRASH SAFETY INVESTIGATIONS.

1. The Act Mandates Disclosures Unless the Witness Statements Fall Under One of the Nine Exclusive Narrow Exemptions.

In enacting the Freedom of Information Act ("FOIA"), Congress enacted a broad mandate to all government agencies, including the Department of Defense, to disclose to the public all information in their possession, so as to ensure an informed electorate capable of knowledgeably deciding matters of public interest. S. Rep. No. 813, 89th Cong., 1st Sess. 2-3, 10 (1965) ("*1965 Senate Report*"); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966) ("*1966 House Report*"); *FBI v. Abramson*, 456 U.S. 615, 621 (1982). It sought to "permit access to official information long unnecessarily shielded from view"; *EPA v. Mink*, 410 U.S. 73, 79-80 (1978), "to check against corruption and to hold the governors accountable to the governed", *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and to prevent agencies from "hid[ing] mistakes or irregularities committed by the agency," *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 385 (1980).

This mandate is limited only by nine explicitly exclusive exemptions intended to set up concrete, workable standards for determining what information must be disclosed. 5 U.S.C. § 552(c); *EPA v. Mink, supra*, at 79; *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); *Administrator, FAA v. Robertson*, 422 U.S. 255, 262 (1975); *FOMC v. Merrill*, 443 U.S. 340, 351-52 (1979). The ex-

emptions are to be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *FBI v. Abramson, supra*, at 630. "When in doubt, the department or agency was supposed to lean toward disclosure, not withholding." "*Administration of the Freedom of Information Act*", 21st Report of the Committee on Government Operations, H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 7 (1972).

The Act was specifically intended to abolish agency withholding of documents "required for good cause to be held confidential" or "requiring secrecy in the public interest". *1965 Senate Report* at 3.

Against this background, it is clear that Exemption 5 cannot have been intended to include a pre-FOIA discovery "privilege" that was judicially created based solely on the concept of government efficiency.

2. The Witness Statements Do Not Fall Under Exemption 5.

(a) The Witness Statements Are Not Intra-Agency Memoranda Subject to Exemption 5.

The government seeks a ruling from this Court that *every* witness statement received by a military accident investigation board is privileged under Exemption 5, no matter what its source. This argument seeks an interpretation of Exemption 5 which is inconsistent with its express language.

"Exemption 5 . . . applies only to documents that (a) are 'inter-agency or intra-agency memorandums or letters,' " *FOMC v. Merrill*, 443 U.S. 340, 351 (1979), and is "a provision intended to protect the confidentiality of purely *internal* governmental deliberations," H.R. Conf. Rep. No. 94-144, 94th Cong., 2d Sess., 26 (1976) (emphasis in the original).

This restriction in the express language of Exemption 5 in itself excludes witness statements given to military accident boards, as these statements often are received from persons who are not members of the armed forces or even government employees, such as civilian witnesses, injured parties, and contractor representatives. These statements clearly could not be construed to be protected by Exemption 5 without an expansive interpretation of the words "inter-agency" and "intra-agency", which would violate "the oft-repeated caveat that FOIA exemptions are to be narrowly construed". *FBI v. Abramson, supra,* at 630.

(b) The Witness Statements Are Purely Factual Materials Which Exemption 5 Was Not Intended to Protect.

As the legislative history and prior decisions of this Court clearly set forth, the purpose of Exemption 5 was to protect the government's executive privilege against the disclosure of pre-decisional advice, opinions and discussions concerning the development of legal and policy matters. Exemption 5 was never intended to prevent the disclosure of purely factual investigative matters, such as the witness reports at issue.

As initially proposed and passed by the Senate, Exemption 5 would have protected only those documents "dealing solely with matters of law or policy."[2] As this Court stated in *EPA v. Mink, supra,* at 90-91:

> This formulation was designed to permit "[a]ll *factual* material in Government records . . . to be made available to the public." The formulation was severely

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[2]During the 1964 Senate floor debate on S1666, the Senate rejected an amendment offered to amend this to "dealing with matters of fact, law or policy". *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles,* Subcomm. on Administrative Practices and Procedure of the Comm. on the Judiciary, U.S. Senate, 93d Cong., 2d Sess. 110-11 (1974).

> criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to the public. As a result of this criticism, Exemption 5 was changed to substantially its present form.

This Court has consistently held that Exemption 5, as finally enacted, was primarily intended to protect the government's executive privilege.[3] *See, e.g., EPA v. Mink, supra,* at 87-89; *N.L.R.B. v. Sears Roebuck & Co., supra,* at 150. It has also consistently held that that privilege, and hence Exemption 5, does not apply to purely factual material.

In *EPA v. Mink, supra,* the Court found that Congress "legislated against the backdrop of . . . case law", *id.* at 89, under which "purely factual material . . . would generally be available for discovery", *id.* at 88. It then stated:

> Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.
>
> *Nothing in the legislative history of Exemption 5 is contrary to such a construction.* [*Id.* at 89 (emphasis added).]

Access to material under Exemption 5 thus "extended to and continues to extend to the discovery of purely factual material". *Id.* at 91.

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[3]The amendment to Exemption 5 was also intended to protect documents which would have been subject to the attorney-client and attorney work product privileges. S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)

What is protected by Exemption 5 are documents reflecting "the decision-making process of government agencies". *N.L.R.B. v. Sears Roebuck & Co., supra,* at 150. These documents have been described by this court as "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated", "which reflect the agency's group thinking in the process of working out its policy", *id.* at 153, "internal agency deliberations" and "advice, including analysis, reports, and expression of opinion within the agency", *FOMC v. Merrill, supra,* at 359, 360, and "the give-and-take of the decisional process", *FBI v. Abramson, supra* at 630.

As this Court recently summarized:

> As our cases interpreting Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), make clear, this privilege would not protect merely "factual" material, but only "deliberative or policymaking processes."

Herbert v. Lando, 441 U.S. 153, 193 (1979).

The witness statements at issue are not statements of policy, expressions of opinions, recommendations, or advice concerning agency decision-making. They are, instead, statements made by percipient witnesses as to the facts they have observed relating to a given aircraft accident. Unlike the statements considered by this Court in *Reynolds v. U.S.*, 345 U.S. 1 (1952), they do not relate to classified matters or national security.[4] They are, thus, not the type of material that was intended to be protected by Exemption 5.

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[4]If the statements did relate to classified information, their release would be subject to the protection of Exemption 1 to the Act, 5 U.S.C. § 552(b)(1). Even then, however, they would not be subject to the absolute confidentiality urged here by the government, as they would have to be considered individually to determine the propriety of their classification.

(c) Exemption 5 Does Not Incorporate the Privilege for Witness Statements Created by *Machin v. Zuckert*.

In *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), the court created a new civil discovery privilege for the type of witness statements at issue here. The court's opinion was based on arguments by the Air Force which are indistinguishable from those asserted in this case, that disclosure of the statements "would prejudice the efficient operation of the Department of the Air Force and . . . would be contrary to the public interest." *Id.* at 338-39.

Less than one year later, the Senate began the process that led to FOIA, finding that terms such as "requiring secrecy in the public interest" and "required for good cause to be held confidential" had been abused to withhold information "only to cover up embarrassing mistakes and irregularities". S. Rep. No. 88-219, 88th Cong., 2d Sess. (1964), reprinted at *1974 Source Book* 91.

A review of the legislature history clearly shows that Congress rejected incorporation of the *Machin* privilege.

(i) *Congress Did Not Intend to Incorporate All Existing Discovery Privileges Into Exemption 5.*

As this Court has noted in the past, "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies", *EPA v. Mink, supra*, at 86, and "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery", *FOMC v. Merrill, supra*, at 354.

> Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution. [*Id.* at 355.]

This caution is especially appropriate where the privilege is based on the very standard that Congress sought to eliminate by enacting FOIA, and where the legislative history shows that Congress expressly refused to amend Exemption 7 to include the privilege and subsequently declined to enact specific legislation to bring the privilege under Exemption 3.

(ii) *The Machin Privilege Is Inconsistent With the Purpose of FOIA.*

As was discussed previously, the purpose of FOIA was to prevent agencies from hiding their mistakes by eliminating such vague phrases as "requiring secrecy in the public interest" as a basis for denying the release of information. *1965 Senate Report* 3; *EPA v. Mink, supra*, at 79; *GTE Sylvania, Inc. v. Consumers Union of the United States, supra*, at 385.

The *Machin* privilege is based on just that rejected standard, and has the very same effect of keeping the public from knowing the facts about mistakes that caused accidents. For this Court to accept the government's argument that Exemption 5 incorporates the *Machin* privilege, it must find that Congress intended, without saying so, to preserve a privilege based on the very standard it was expressly rejecting. Such a finding is clearly unwarranted, especially in light of the legislative history discussed subsequently.

(iii) *Congress Was Aware of the Machin Privilege When It Enacted FOIA, and Refused to Amend Exemption 7 to Protect Such Statements.*

The *Machin* privilege was brought to Congress' attention during the committee hearings before both the House and the Senate. However, contrary to the implication of the

government's brief, it was discussed in relation to Exemption 7, 5 U.S.C. § 552(b)(7), not Exemption 5. A review of the legislative history of Exemption 7 shows a clear rejection of the privilege by Congress and not, as the government argues, a desire to perpetuate the privilege.

Exemption 7, which pertains to investigatory files, had its origin in section 3(c)(7) of S1666, the 1964 Senate predecessor to FOIA. That section exempted "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." The Department of Justice strenuously opposed this provision, on the grounds that:

> [T]he agencies have a duty to keep informed . . . to avoid official action based on inadequate information. . . .
>
> It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of law enforcement and *other agency functions* from . . . witnesses surely will be seriously jeopardized. [*Administrative Procedure Act: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 212 (1964), emphasis added.]

In response to these and other comments, the subsequent legislation proposed revising Exemption 7 to provide protection for information provided in confidence, but only for "investigatory files compiled for law enforcement purposes."

This formulation was strenuously opposed before both Houses by both the Departments of Justice and Defense, with the *Machin* privilege being expressly listed as one of

the privileges for which no provision had been made.[5] In its written comments to both the House and the Senate, the Department of Defense stated, ". . . the exception provided in section 3(c)(7) for investigative files indicates recognition of the necessity for protecting such information, but the limitation on the protection significantly reduces its beneficial effect. There are many investigative files compiled and held by the Department of Defense for other than 'law enforcement purposes' which nevertheless require the same protection." *Administrative Procedure Act: Hearings before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 417-18 (1965) (hereinafter "*1965 Senate Hearings*"); *see, also, Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 220 (1965) (hereinafter "*1965 House Hearings*"). There followed a lengthy laundry list of the types of information the Department thought deserved protection, including the witness statements protected by the *Machin* privilege.

The Department of Justice position was set forth in both the testimony and written statement of Assistant Attorney General Schlei. Mr. Schlei stated:

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[5]In its brief, at pp. 28-29, the government has noted the CAB's opposition to Exemption 5, and has implied that it was based on concerns similar to those raised by the Justice and Defense Departments. However, the quoted language about "opening up 'investigatory files' " in fact refers to the CAB's opposition to Exemption 7, based *solely* on the grounds that "such files contain staff views and statements." *1965 House Hearings* at 237; *1965 Senate Hearings* at 367.

The CAB was thus making the objection to disclosure of documents which were mixtures of fact with matters of law or policy, which Exemption 5 was subsequently amended to cure. The CAB never expressed any concern about releasing witness statements, and as will be discussed subsequently, both the CAB and the NTSB have consistently released such statements.

> The bill proposes to provide a general public information statute by revising section 3 to eliminate all application of judgment in the treatment of the important, and often difficult, matter of public information. We think the approach of the proposal, as well as its technique, is basically deficient and falls far short of accomplishing the expressed purpose of the subcommittee in this important area.
>
> . . .
>
> The inevitable result of this approach would be nondisclosure of many matters as to which there can be no justification for nondisclosure and disclosure of many matters which properly should be withheld. If it is to provide a workable public information statute, the proposal must abandon this approach.

[*1965 Senate Hearings* at 196.]

Mr. Schlei then presented his laundry list of alleged problems which would be created by adoption of the exemption section of the bill, including the disclosure of aircraft accident witness statements.[6] His written statement expanded on the Department's opposition to the entire concept of the

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[6]The government's brief, at p. 27, sets forth Mr. Schlei's statement that the changes he referred to "are not intended by the proponents." *1965 Senate Hearings* at 196. Mr. Schlei's opinion of the intent of the proponents of the bill must obviously be taken with a large grain of salt. As the complete text of his comments makes clear, he was testifying in opposition to the entire concept of the exemptions. As this Court has stated repeatedly, "In construing laws we have been extremely wary of testimony before committee hearings," *S & E Contractors, Inc. v. U.S.*, 406 U.S. 1, 13 fn. 9 (1972), and "[I]t is well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question," *Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 fn. 13 (1973).

The legislative history also discloses that Mr. Schlei was not aware of the *Machin* decision at the time he testified and gave his statements. During the House hearings, he was asked in the course of what cannot be described as friendly questioning by Mr. Kass, to explain the *Machin* privilege to the committee. When asked, "Are you familiar with that case?", he replied, "I am sorry to say that I am not." *1965 House Hearings* at 24.

exemptions, but made no mention of the *Machin* privilege. Instead, his comments were clearly intended to apply to *every* type of agency investigation:

> It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of regulatory, benefit, and other agency functions from complainants and witnesses surely will be seriously jeopardized. In many cases persons sought to be interviewed, not only concerning criminal violations or fraudulent practices in a regulated activity, but also with respect to competition, business conditions, or other matters in which no accusations are involved, will refuse to talk to agency investigators and employees as soon as they realize that all information furnished by them may be made public. [*1965 Senate Hearings* at 206.]

However, despite these clear and unambiguous requests from the government to widen the scope of Exemption 7 to include materials such as witness statements to aircraft accident boards, Exemption 7 as enacted by Congress remained limited to "investigatory files compiled for law enforcement purposes". In view of its express refusal to amend Exemption 7 to protect the witness statements at issue here, it seems apparent that Congress intended that they not be protected by FOIA.

(iv) *There Is No Indication in the Legislative History That Congress Intended to Amend Exemption 5 to Include Investigatory Material Not Covered by Exemption 7.*

At the time Congress refused to amend Exemption 7 to cover statements from witnesses, it did amend Exemption 5. As was previously discussed, this amendment was made in response to concerns expressed about the disclosure of

documents containing factual material in addition to matters of law or policy. In its brief, the government argues that this amendment was also made to extend protection to confidential witness statements in non-law enforcement investigations. This argument is totally devoid of any support in the legislative history.

The only references to this material anywhere in the legislative history were in the statements of government agencies in opposition to Exemption 7. Not a single member of Congress expressed the view that such statements should be protected under either exemption, let alone under Exemption 5. Indeed, not even the government argued that Exemption 5 should include such materials.

In its opposition to the 1964 predecessor to FOIA, the Justice Department directed its comments on Exemption 5 solely to the issue of internal memoranda containing advice, proposals, analysis or recommendations. *1964 Senate Hearings* at 213. The Defense Department objected on the grounds that "almost every conceivable subject can be construed as being a matter of policy or law, so that the [exemption] . . . would have no discernable meaning." *1964 Senate Hearings* at 493.

In the 1965 committee hearings, the Defense Department's comments on Exemption 5 were limited solely to the issue of disclosure of mixed documents of fact, law and policy. *1965 Senate Hearings* at 417; *1965 House Hearings* at 220.

There is, thus, nothing in the legislative history from which it can be inferred, either implicitly or by way of analogy, that witnesses statements specifically excluded from Exemption 7 were thereafter to be included in Exemption 5.

B. CONGRESS HAS REPEATEDLY REJECTED SIMILAR ARGUMENTS SUBSEQUENT TO ITS ENACTMENT OF FOIA.

In addition to the legislative history of FOIA itself, there is significant legislative history concerning both the specific types of statements at issue here and similar arguments for confidentiality which reinforces the conclusion that Congress does not intend these documents to be withheld.

1. Congress Has Twice Rejected Legislation to Create the Very Privilege at Issue Here.

Exemption 3 to FOIA, 5 U.S.C. § 552(b)(3), provides that the Act does not apply to information exempted by statute from disclosure. The government has twice requested that Congress pass legislation specifically prohibiting the release of confidential witness statements given to military aircraft accident boards, and Congress declined both requests.

In January 1980, the Department of Defense forwarded to the House a request for legislation and draft legislation which provided, in part, that release, discovery or use in litigation of confidential witness statements given to accident investigation boards would be prohibited unless authorized by the Secretary of the military service involved. *Hearing on H.R. 6362 Before the Procurement and Military Nuclear Systems Subcomm. of the House Committee on Armed Services*, 96th Cong., 2d Sess. 1-3 (1980) (hereinafter "1980 Hearing").[7] Following a one-day hearing at which the only witness was Lt. Gen. Howard Lane, the Inspector General, U.S. Air Force, the committee favorably reported the bill to the House. H.R. Rep. No. 96-1445, 96th Cong., 2d Sess. 1 (1980). However, the bill was never acted on by either the House or the Senate.

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[7] The relevant portions of the draft legislation are set forth at Appendix A.

In April 1983, an Executive Branch legislative request for similar legislation was transmitted to the Senate. S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 263 (1983). The proposed legislation was incorporated in the *Department of Defense Authorization Act*, 1984, S675, 98th Cong., 1st Sess. (1983) as Sec. 1009,[8] and was passed by the Senate, apparently without any debate. The Conference Committee deleted the provision, stating, "[T]he conferees believe that this matter requires further study," S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 263 (1983), and requesting further data from the Department.[9]

This legislative history is plainly in conflict with the government's argument that Congress clearly intended these statements to be privileged. Had the "privilege" been widely accepted by Congress, we sincerely doubt that a Conference committee would return the matter for further study.

2. Congress Expressly Overruled the Decision in Administrator, *FAA v. Robertson*, Which Was Based on the FAA's Identical Argument.

Congress also reacted swiftly to overrule the decision of this Court in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which upheld the withholding of confidential data by the Federal Aviation Administration. The FAA's justification for withholding data in that case was identical to that advanced by the government here, that information

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[8]The relevant portions of that section are set forth at Appendix B.

[9]According to information received in informal telephone conferences with members of the Senate committee staff, the provision was deleted at the request of Senator Tower, the sponsor of the legislation, after it was brought to his attention by the Texas Daily Newspaper Association. The provision had apparently been inserted by members of the Committee Staff, and passed unnoticed as the bill progressed through the Senate.

crucial to aviation safety would not be provided to the government if a promise of confidentiality could not be provided to the supplier.

The FAA's answer also explained its view of the need for confidentiality in SWAP Reports:

> "The effectiveness of the in-depth analysis that is the essence of SWAP team investigation depends, to a great extent, upon the full, frank and open cooperation of the operator himself during the inspection period. His assurance by the FAA that the resulting recommendations are in the interest of safety and operational efficiency and will not be disclosed to the public are the major incentives impelling the operator to hide nothing and to grant free access to procedures, system of operation, facilities, personnel, as well as management and operational records in order to exhibit his normal course of operations to the SWAP inspectors."

[*Id.* at 259-60.]

Although that case was based on an interpretation of Exemption 3, the Congressional reaction is relevant to the issue before the Court. The Court interpreted Exemption 3 as allowing the withholding of information if a statute gave the agency the discretion to withhold information, in that case 49 U.S.C. § 1504 which then allowed withholding when the agency believed "a disclosure of such information is not required in the interest of the public."[10]

Congress reacted swiftly to amend Exemption 3 to allow withholding only if the statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular cri-

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[10]As will be subsequently discussed, Congress also subsequently amended 49 U.S.C. § 1504 to remove the Administrator's discretion to withhold this type of information.

teria for withholding or refers to particular types of matters to be withheld." The purpose of this change was expressly to overrule the *Robertson* decision, H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 22-23 (1976) ("*House Report*"); H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976), which "misconceive[d] the intent of Exemption 3", and to "*eliminate the gap created in the Freedom of Information Act by the Robertson case*", *House Report* at 23 (emphasis added).

The sole effect of the *Robertson* decision was to allow the discretionary withholding of information, based on an agency's belief that such withholding was "in the public interest", where a statute gave such discretion, and Congress thus perceived that discretion as creating an unintended gap in FOIA which required immediate rectification. By amending Exemption 3, Congress sent a clear message that discretionary withholding of information *without the express approval of Congress* was contrary to the intent of FOIA.

And yet, despite this message, the government here urges this Court to find that the identical "gap" has existed in the Act all along under Exemption 5, differing only in that here the government does not even have a statutory grant of discretion. Such an interpretation would in effect say that Congress engaged in a futile act when it amended Exemption 3. It would also lead to the totally illogical result that an agency would have unfettered discretion to withhold information, under Exemption 5, if Congress had not spoken on the subject at all, but would have either no discretion or only the discretion expressly granted by Congress if Congress had spoken on the subject, under Exemption 3. This result would stand Exemption 3 and FOIA on its head, and should not be adopted by this Court.

3. Congress Has Expressly Revoked the Authority of the FAA to Withhold Confidential Information Relating to Aviation Safety.

In addition to amending Exemption 3 in response to *Robertson*, Congress also acted to amend 49 U.S.C. § 1504 to remove the discretionary authority pursuant to which the FAA had withheld the information there. At the time of *Robertson*, 49 U.S.C. § 1504 provided that on objection by any person, the Administrator would withhold information if, in his judgment, disclosure would "adversely affect the interests" of the objector "and is not required in the interest of the public". However, in 1978 Congress amended that section to allow withholding only "if disclosure of such information would prejudice the formulation and presentation of positions of the United States in international negotiations or adversely affect the competitive position of any air carrier in foreign air transportation". In adopting this amendment, the House specifically mentioned the FAA's practice of "making substantially more information available to the public" as required by FOIA and the Sunshine Act, which amended Exemption 3, H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 20 (1978), reinforcing its statement that all information be disclosed unless expressly limited by the Congress.

The FAA, like the military, bears a heavy responsibility for aviation safety, including the certification of aircraft, many of which are also used by the military, the certification of pilots, mechanics and air traffic controllers, the dissemination of aviation weather information, and operation of the civilian air traffic control system, all functions also conducted by the military. In addition, the FAA conducts many aircraft accident investigations in the United States pursuant to a delegation of authority by the NTSB under 49 U.S.C. § 1903(a), and is responsible for the basic fact-

finding relating to these accidents, including the obtaining of witness statements.

It was against that background that Congress amended Section 1504 to provide for disclosure.[11]

4. Congress Has Specifically Directed Public Disclosure of Identical Information Obtained by the NTSB.

The National Transportation Safety Board has been charged by Congress with the responsibility for investigating and determining the probable cause of major transportation accidents, including both those involving solely civilian aircraft and those involving both military and civilian aircraft. 49 U.S.C. § 1903(a), 49 U.S.C. § 1442. In discharging that responsibility, it obtains witness statements concerning accidents that it investigates. And, as was the case with the FAA, Congress has amended the NTSB's authority since the enactment of FOIA to eliminate the Board's discretion to release information.

At the time FOIA was enacted, the Board was directed to "investigate such accidents and report the facts, conditions and circumstances relating to each accident" and "make such reports public in such form and manner as may be deemed by it to be in the public interest." 49 U.S.C. 1441(a)(2) and (a)(4). However, in the Independent Safety Board Act of 1974, Pub. L. 93-633, Congress rewrote the NTSB charter and directed that "copies of any communication, document, investigation, or other report, or information received by the Board . . . shall be made available to the public," 49 U.S.C. § 1905(a), except for information

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[11]Of course, much information received by the FAA continues to be protected by other exemptions to FOIA, including Exemptions 4 (trade secret information obtained during aircraft certification), 6 (personal information concerning pilots, etc.), and 7 (investigations conducted for enforcement proceedings).

on trade secrets and *information subject to the FOIA exemptions*.

In its comments on the proposed legislation, the Board stated:

> The provision concerning public access to information would appear to pose no serious problems since the Board has always made public its orders, reports, safety recommendations *and, of course, all the facts obtained in its accident investigations*.

Independent Safety Board Act of 1974, Hearings before the Senate Comm. on Commerce, 93d Cong., 2d Sess. 129 (1974) (emphasis added). In its report, the Committee stated:

> This section sets up a broad standard for public availability of the information generated by the Board. In doing so, it echoes the broadest part of the Freedom of Information Act (5 U.S.C. 552) and evidences the Committee's belief that *such information should be generally available to the public, to give it the maximum life-saving effectiveness*.

S. Rep. No. 93-1192, 93d Cong., 2d Sess. 45 (1974) (emphasis added).

Congress was thus aware that the NTSB had always released information to the public, including witness statements, and stated that that disclosure was to continue, *echoing FOIA*, to maximize the benefit to safety. Once again, Congress has mandated the disclosure of witness statements concerning civilian accidents, which are identical in purpose to those the military here seeks to shroud in secrecy. It is not possible that Congress would differentiate its intent based solely on whether the accident involved a military or civilian aircraft.

5. Congress Has Criticized the Withholding Under FOIA of Safety-Related Information in Other Contexts.

In addition to its failure to grant the government the secrecy it seeks through specific legislation, and its clear direction that identical information be disclosed relating to non-military accidents, the Congress has criticized at least one other agency for withholding information gathered during a safety investigation.

In 1972, the House undertook a review of the implementation of FOIA, and found that "most of the federal bureaucracy already set in its way never got the message". H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 7 (1972). Among the specific abuses detailed in the Report was the withholding of inspectors' reports of health and safety hazards under OSHA during the pendency of enforcement proceedings. *Id.* at 26-28. The Committee concluded, "This use of [Exemption 7] in such situations involving occupational safety and health, even the lives of millions of American workers, is contrary to sound public policy." *Id.* at 28. Given the weapons systems often involved in military aircraft accidents, it cannot be said that the same does not apply to the statements at issue here.

C. THE GOVERNMENT HAS FAILED TO MEET ITS BURDEN OF PROOF UNDER FOIA.

The Act provides that the government bears the burden of proof of establishing that the requested information is exempt. 5 U.S.C. 552(a)(4)(B); *FOMC v. Merrill, supra,* at 352. Even if Exemption 5 were to protect witness statements given in confidence, the government has failed to meet its burden of showing that the statements sought by respondents were in fact given pursuant to a promise of

confidentiality. It has also failed to meet its burden of showing that the professed safety hazard of releasing the reports actually exists.

1. There Is No Evidence That Either of the Statements Sought Was Actually Given Pursuant to a Promise of Confidentiality.

The government requests that this Court find that the witness statements sought by petitioners are protected by Exemption 5 on the grounds that such statements were given pursuant to a promise of confidentiality. However, it has never presented any evidence to show that either of the statements sought was, in fact, given pursuant to a promise of confidentiality.

The government's position is based on the allegation that the Hoover and Dickson statements were given in response to a promise of confidentiality. The record below amply shows that no such promise can be proved to have been given.

In its motion for summary judgment, the government contended that the Accident Investigation Board's investigation of this accident had been conducted pursuant to Air Force regulation AFR 127-4, *dated October 24, 1975*, and the court so found.[12]

After it was noted during oral argument before the Ninth Circuit that this regulation *postdated* the accident, and the Board, by nearly two years, the court invited the government to submit a supplemental brief on that issue, *including a reference "to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought"*.[13]

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[12]Finding of Fact 1, set forth at Pet. App. 22a.

[13]Br. in Opp. App. 1.

The government did submit a supplemental brief,[14] *but was unable to identify a single piece of evidence in the record to substantiate its claim that promises of confidentiality had in fact been made*. Instead, it referred for the first time to AFR 127-4, *dated January 1, 1973*, which it now contends is the correct regulation, and further attempted to establish a general custom and practice of such assurances being given.

The government attached a portion of AFR 127-4 dated January 1, 1973, to its petition. Pet. App. at 31a. It did not advise the court of the portions of that regulation which disclose what a witness is to be told before he gives a statement. Those portions provide *only* that:

> Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence.[15]

Thus, in the regulations that the government now claims applied, there is nothing which requires, or even suggests, that a witness be promised that his testimony will be confidential.

As the government has been unable to produce a scintilla of evidence that either Hoover or Dickson was promised that his statement would be confidential, the issue presented does not arise under the facts before the Court.

The government has, thus, failed to produce any evidence that the witnesses were promised that their statements would be confidential.

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[14]Br. in Opp. App. 2-5.
[15]Br. in Opp. App. 6, para. 12(c).

2. The Government Has Failed to Show That Release of the Witness Statements Will Have Any Negative Effects on Safety.

The government alleges that if witness statements are found to be releasable, its sources of information will dry up. It has produced no evidence to support this amazing proposition, and all available evidence is to the contrary.

The sole support in the record for this proposition is the affidavit of Major General Russell (J.A. 37-40). As the Court of Appeals noted, this affidavit is conclusory and devoid of any supporting evidence.[16] *Weber Aircraft Corp. v. United States*, 668 F.2d 638, 646 fn. 12 (1982). It also does not show whether General Russell ever reviewed the statements himself. As this Court stated in *Reynolds v. U.S.*, 345 U.S. 1 (1952), when it previously considered an Air Force claim of confidentiality for witness statements like those at issue here, a claim of executive privilege "is not lightly to be invoked. There must be a formal claim . . . lodged by the head of the department . . . *after actual personal consideration by that officer*," *id.* at 7-8 (emphasis added) and "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers", *id.* at 9-10. Or, as Senator Chiles commented during the floor debate on the 1974 amendment to Exemption 1:

> However, to raise the opinion of one person, especially an interested party, to that of a rebuttable

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[16]The affidavit does contain a reference to accident rates in 1950 and 1979, and makes a hearsay reference to an unidentified study. However, nothing is shown to tie the decrease in accident rates to the confidentiality of witness statements, and Weber would note that the years chosen are themselves suspect, as 1950 was at the height of the Korean War buildup, and at the same time as jet aircraft and helicopters were first entering service and represented untried technology; and 1979 was during peace at a time when many aircraft were grounded due to parts shortages, flying time was very limited due to fuel and budgetary constraints, and most aircraft were fully proved.

presumption is to destroy the possibility of adequate judicial oversight which is so necessary for the Freedom of Information Act to function.

We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake.

1975 Source Book 319.

In addition to this lack of evidence from the government, the experience of the government in investigating civilian aircraft accidents militates strongly against the government's position here.

As was discussed previously, both the FAA and NTSB investigate civilian aircraft accidents and obtain witness statements. Both routinely release these statements, and neither has ever argued that it needed confidentiality for these statements.[17] The magnificent record of these agencies in determining the causes of accidents and preventing future accidents, without the help of confidentiality, shows just how weak the government's argument actually is.[18]

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[17]In its brief, the government has cited the Aviation Safety Reporting Program as an example of the FAA's and NASA's finding of the value of confidentiality. But what the government has not told this Court is that witness statements submitted to that program are *not* given confidentiality if they relate to an *accident* or criminal activity. Those statements, with all identifying details, are forwarded to the FAA and NTSB if they relate to an accident, or to the Justice Department if they relate to criminal activity. 44 Fed. Reg. 24981, April 27, 1979. *See, also,* 41 Fed. Reg. 15903-04, April 15, 1976.

[18]The government argues that this Court should disregard any comparison between the military and civilian programs because of the "differences" between them. But the distinctions made by the government subsume the issue before the Court. The government argues that the NTSB charter requires the release of witness statements, whereas there is no similar mandate to the military. But that latter proposition is precisely what this Court must decide: does FOIA mandate disclosure by the military as well? Likewise, the argument that the military lacks subpoena power ignores the fact that it has told Congress it does not want that power, *1980 House Hearings* at 23, as well as the government's own admission that it has the authority to order the testimony of members of the military, such as the witnesses whose statements are sought by respondents. Brief for Petitioner at 3, fn. 3.

The government's argument is further weakened by its assertion of confidentiality for *every* statement by *every* witness, including the vast majority of witnesses who would testify freely without confidentiality or who would be willing to have their statements released.[19] The scope of the privilege being sought thus goes far beyond what can even colorably be argued to be necessary.[20]

There is, in short, no real basis upon which this Court can find that confidentiality, as sought by the government, is in fact required.

D. EQUITY REQUIRES THAT THE STATEMENTS BE RELEASED.

Even if the statements were within the *Machin* privilege, and the *Machin* privilege were included within Exemption 5, the privilege under Exemption 5 should be limited to the scope of privilege which would, in fact, be available in civil litigation.

> [S]ince the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein . . . it is reasonable to construe Exemption 5 to exempt those documents, *and only those documents*, normally privileged in the civil discovery context. [*N.L.R.B. v. Sears, Roebuck & Co., supra*, at 149.]

The availability of the executive privilege in civil litigation is strongly dependent on the necessity for the information. As this Court stated in *Reynolds v. U.S., supra*, in

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[19]During the pendency of this appeal, counsel for respondents have asked a significant number of witnesses in military aircrash litigation whether they would object to the release of their statements to the accident investigation boards. They have unanimously said they had no objection.

[20]If the government really thinks it will have a problem with certain witnesses, we see no reason it could not seek authority from Congress for a type of limited use immunity such as exists in criminal law.

considering another request for this type of statement in the civil litigation context, "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Id.* at 11. The necessity in this case plainly outweighs the government's questionable assertion of the need for confidentiality.

1. Release of the Statements Here Will Prevent Perjury, and Further a Fundamental Goal of the Legal System: the Ascertainment of the Truth.

As has previously been discussed, the statements which are sought by respondents are at direct variance with the sworn testimony of the witnesses in both the military legal investigation and in depositions in the underlying litigation. Thus, the statements are crucial to proving the truth as to what really happened, to allowing the jury to determine the credibility of the witnesses, and to the prevention of perjuried testimony at trial. In *U.S. v. Havens*, 446 U.S. 620 (1980), this Court held that not even the Fourth Amendment provided a strong enough privilege to allow it to be "perverted into a license to use perjury," *id.* at 626, as "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system," *id.* at 626. The executive privilege relied on here by the government is surely no stronger a shield than the Fourth Amendment, and should also be overcome to avoid the introduction of perjured testimony.

It is also clear that there is no other source for this information, as the statements are unique. The Air Force "legal investigation", which the government argues is a sufficient source of information to civil litigants, does not contain the information in these statements, and is in fact directly contrary to the content of these statements.

Indeed, the very existence of the accident investigation board in addition to the "legal investigation" is an admis-

sion by the government that the information developed by the "legal investigation" is inadequate, as a general proposition, for the determination of what really happened in an accident.[21]

2. The Privilege Has Been Waived Both by the Government and the Witness.

As previously noted, portions of the Hoover statement were voluntarily produced pursuant to a valid subpoena by an Air Force employee, and were reviewed by all parties present at the deposition. That release constitutes a waiver of whatever privilege the Air Force may have had under FOIA. As the Fifth Circuit stated when considering a similar release of accident board reports:

> Whether it results from negligence, or from voluntary and knowing acts on the part of Navy personnel, the fact remains that the release of these reports to persons other than those authorized by Navy regulations can be traced directly to the Department of the Navy. . . . Thus, the Navy did not adhere to its own regulations pertaining to the dissemination of information contained in these [Aircraft Accident Reports] and should now be held to have waived the exemption which it might have had under the Freedom of Information Act insofar as this particular report is con-

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[21]In addition to the fact that the legal investigation is often completed significantly after the safety investigation, the legal investigation is typically conducted by an officer from the same base as the accident aircraft crew, who rarely has any training or experience in accident investigation (as opposed to the safety board, which always has a trained investigator as a member), and who almost never has the same access to witnesses or consultants as the safety board members (unlike the safety board members, the legal investigation officer rarely visits the accident site, the repair/overhaul facilities for the aircraft, the aircraft manufacturer(s), or any of the facilities that conduct engineering investigations relating to the accident). The report of the legal investigation is thus by its very nature far less factually complete than the safety investigation.

> cerned. The Navy Department simply cannot permit these reports to be available to some people, who are not authorized under its own regulations . . . and then deny the same privilege to others.

Cooper v. Department of the Navy, 594 F.2d 484 (5th Cir. 1979), *cert. denied* 444 U.S. 926 (1976) (Cooper II) (quoting the trial court with approval).

E. THE PUBLIC INTEREST MANDATES RELEASE OF THE WITNESS STATEMENTS.

In addition to the public's clear interest in avoiding unnecessary costs imposed on the judicial system by groundless or unduly extensive litigation, and its interests in avoiding the costs imposed by the imposition of huge judgments on innocent defense contractors, the public has a clear safety interest in the release of military board witness statements. It is a simple fact that much of the military aircraft fleet is composed either of aircraft also in the civilian fleet or aircraft using components used in the civilian fleet. In addition, military pilots fly the same skies, through the same weather and air traffic as civilian pilots. The unnecessary withholding of witness statements thus deprives the civilian public of information that may be beneficial in preventing civilian accidents, either by way of providing examples of what can happen in given circumstances, or through the identification of potential problems with similar civilian equipment. It also prevents the public from learning of problems in the military, either in the quality of personnel, lack of parts or funding, or simple poor judgment, and hence deprives the public of input in correcting these problems. Finally, it deprives the public of the knowledge of what went wrong and resulted in the destruction of expensive and potentially catastrophically destructive weapons systems purchased with the public's money.

IV.
CONCLUSION.

In conclusion, there is no evidence in the legislation history of the Act to support the government's position. On the contrary, the legislative history shows that Congress rejected a suggestion that Exemption 7 be amended to protect such statements, and never intended Exemption 5 to cover purely factual documents. Congress has failed to enact specific legislation to give the military the specific protection it here seeks under Exemption 3, and has clearly mandated the disclosure of similar materials obtained by the government in civilian accident investigations. And, even if this Court should hold that Congress intended Exemption 5 to incorporate the *Machin* privilege, the equities of this case and the government's failure to meet its burden of proof still mandate disclosure.

Finally, the government's argument that Exemption 5 confers authority to an agency to withhold disclosure of intra-agency memoranda where disclosure would undermine the effectiveness of the agency's policy is subject to the same infirmity as this Court found in the essentially identical argument made by the FOMC in *FOMC v. Merrill, supra,* at 354:

> [T]he Committee's argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the

basis of some vague "public interest" standard.

In view of the foregoing, respondent Weber Aircraft Corporation respectfully requests that this Court affirm the decision below.

December 8, 1983.

Respectfully submitted,

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APPENDIX A.

§ 371. *Investigation reports: use as evidence*

(a) Under regulations prescribed by the Secretary concerned, a safety investigation and report of each accident involving an aircraft of his armed force may be made in the interest of safety to identify the factors, human and material, which have directly or indirectly contributed to the accident to determine the cause and prevent recurrence.

(b) Unless expressly authorized by the Secretary concerned, no part of a record or report of a safety investigation listed in subsection (c) shall be —

(1) released outside of the armed force concerned;

(2) subject to discovery; or

(3) used as evidence, or to obtain evidence, in any disciplinary action, suit, or other judicial or administrative proceeding arising from the accident investigated.

(c) Subsection (b) applies to —

(1) proceedings, findings, and recommendations;

(2) statements or information obtained under an express promise of confidentiality from a witness or manufacturer;

. . .

H.R. 6362, 96th Cong., 2d Sess. (1980)

APPENDIX B.

§ 391. *Definition*

In this chapter, "safety investigation" means an investigation conducted solely to determine the cause of an aircraft accident and to obtain information which may prevent the occurrence of similar accidents.

§ 392. *Investigation reports; limitation on use*

(a) The Secretary concerned may conduct a safety investigation of any accident involving an aircraft under the jurisdiction of the Secretary.

(b) No part of any record or report of a safety investigation described in subsection (c) may —

(1) be released outside of the armed force concerned, unless expressly authorized by the Secretary concerned to be released for safety purposes;

(2) be subject to discovery in any judicial or administrative proceeding; or

(3) be used as evidence, or to obtain evidence, in any disciplinary action or suit or other judicial or administrative proceeding.

(c) Subsection (b) applies to any part of a record or report of a safety investigation relating to —

(1) the deliberative portions of an investigation, including any discussion, analysis, opinion, conclusion, finding, or recommendation;

(2) statements or information obtained under an express or implied promise of confidentiality from a witness or manufacturer; or

. . .

Sec. 1009(a)(1), S675, 98th Cong., 1st Sess. (1983)